SHENCOURT SDN BHD

v.

PERUMAHAN NCK SDN BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: W-02-1256-2005]
17 MARCH 2008

CIVIL PROCEDURE: *Counterclaim - Application for leave to proceed with counterclaim after winding-up of company - Whether counterclaim could be dealt with by company's liquidators - Whether counterclaim should be heard in suit against company - Companies Act 1965, s. 263(2)*

COMPANY LAW: *Winding-up - Counterclaim - Application for leave to proceed with counterclaim after winding-up of company - Whether counterclaim could be dealt with by company's liquidators - Whether counterclaim should be heard in suit against company - Companies Act 1965, s. 263(2)*

The plaintiff was a development company engaged in a development project of a complex known as Galaxy Ampang and the defendant was the main contractor. The defendant filed an action against the plaintiff ('S5 suit') for failing to effect a final settlement agreement ('SA') in which the plaintiff had agreed to pay the defendant the amount of RM900,000 and to transfer units of properties in the complex to the defendant or its nominees. Alternatively, the defendant sought from the plaintiff a sum of RM1,585,668 representing the value of the said units, amongst others. The plaintiff made a counterclaim for a sum of RM17,898,000 for rectifying latent defects discovered by the subsequent contractor who had taken over from the defendant. After the defence and counterclaim was filed by the plaintiff, the defendant was voluntarily wound-up by its creditors. The defendant, however, obtained summary judgment in the S5 suit and the plaintiff successfully appealed against the said judgment. The plaintiff then applied for leave pursuant to s. 263(2) of the Companies Act 1965 to proceed with its counterclaim against the defendant. The High Court dismissed the application. Hence, the plaintiff's appeal.

Held (allowing the appeal)
Per Zulkefli Ahmad Makinudin JCA delivering the judgment of the court:

(1) The plaintiff's counterclaim in the S5 suit was, *inter alia*, for a declaratory order that the SA was null and void as against the plaintiff. The SA did not only involve monetary payment but also payment by way of contra properties to the defendant and its nominees. It was therefore imperative for the plaintiff to obtain such a declaration as it would also determine the rights of contra purchasers whose rights emanated from the SA. The liquidators did not have the power to grant such a declaration. (para 15)

(2) The plaintiff's counterclaim was for rectification costs of RM17,898,000 and general damages to be assessed. In view of the extent and seriousness of the defects wherein there would be some degree of complexity of the issues involved it was unlikely that the defendant's liquidators could adequately deal with the plaintiff's counterclaim and quantify the damages suffered by the plaintiff in the winding-up of the defendant. (para 16)

(3) It was evident from the defendant's affidavit in reply to the plaintiff's present application that the liquidators had already pre-judged the matter and would definitely dismiss the plaintiff's proof of debt. Therefore, it would be impractical and inconvenient for the plaintiff not to continue with its counterclaim under the S5 suit and file its proof of debt, only to file an appeal against the decision of the liquidators soon thereafter. (paras 17 & 18)

(4) The plaintiff's defence and counterclaim included a set-off in the event the defendant succeeded in its claim. As the plaintiff's counterclaim for latent defects against the defendant was far in excess of the defendant's claim and the defendant was now under creditors' voluntary liquidation, it was unlikely that the amount counterclaimed against the defendant would be realised. It was to be noted that if the plaintiff discontinued its counterclaim in the S5 suit and proceeded to lodge a proof of debt with the liquidators, there would be no avenue for the plaintiff to set-off the defendant's claim against the plaintiff. (paras 19)

(5) As the defendant's claim and the plaintiff's counterclaim in the S5 suit were based on the same facts, the balance of convenience was in favour of leave to proceed being granted to the plaintiff. It followed that the plaintiff's counterclaim could not be dealt with adequately in the winding-up by the defendant's liquidators. (paras 20)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif adalah sebuah syarikat pemaju yang terlibat dengan projek pembangunan sebuah kompleks yang dipanggil Galaxy Ampang, di mana defendan adalah kontraktor utamanya. Defendan telah memfail tindakan terhadap plaintif ('guaman S5') kerana gagal melaksanakan perjanjian penyelesaian terakhir ('SA') di mana plaintif bersetuju untuk membayar defendan sebanyak RM900,000 dan memindahmilik unit-unit hartanah kepada defendan atau nomini-nomininya. Secara alternatif, defendan menuntut dari plaintif sejumlah RM1,585,668 yang antara lain mewakili nilai unit-unit tersebut. Plaintif menuntut balas untuk jumlah RM17,898,000 kerana terpaksa memulihkan kecacatan-kecacatan latent yang dijumpai oleh kontraktor terkemudian yang mengambil-alih dari defendan. Selepas pembelaan dan tuntutan balas difailkan oleh plaintif, defendan telah digulung secara sukarela oleh pemiutang-pemiutangnya. Defendan bagaimanapun memperoleh penghakiman terus di dalam guaman S5, namun, penghakiman tersebut telah berjaya dirayui oleh plaintif. Berikutnya, plaintif memohon kebenaran di bawah s. 263(2) Akta Syarikat 1965 untuk meneruskan dengan tuntutan balasnya terhadap defendan. Mahkamah Tinggi menolak permohonan dan plaintif merayu.

Diputuskan (membenarkan rayuan)
Oleh Zulkefli Ahmad Makinudin HMR menyampaikan penghakiman mahkamah:

(1) Tuntutan balas plaintif di dalam guaman S5, antara lain, adalah untuk perintah deklaratori bahawa SA adalah tak sah dan batal setakat yang menyangkuti plaintif. SA bukan sahaja melibatkan pembayaran kewangan melalui kontra hartanah kepada defendan dan nomini-nomininya. Oleh itu adalah imperatif bagi plaintif untuk mendapatkan deklarasi seperti itu kerana deklarasi itu akan juga menentukan hak-hak pembeli kontra yang berbangkit dari SA. Penyelesai-penyelesai tidak ada kuasa untuk memberi deklarasi sedemikian.

(2) Tuntutan balas plaintif adalah untuk kos baikpulih sebanyak RM17,898,000 dan gantirugi am yang ditaksir. Mengambilkira tahap dan keseriusan kecacatan dan pembabitan beberapa isu yang kompleks, adalah tidak mungkin bahawa penyelesai-penyelesai defendan berupaya untuk mengendalikan tuntutan balas plaintif dan menentukan jumlah gantirugi yang ditanggung oleh plaintif di dalam penggulungan defendan.

(3) Adalah jelas dari afidavit jawapan defendan kepada permohonan semasa plaintif bahawa penyelesai-penyelesai telah pun membuat keputusan terhadap halperkara dan pastinya akan menolak bukti keberhutangan yang dikemukakan plaintif. Oleh itu, adalah tidak praktikal dan tidak selesa bagi plaintif untuk tidak meneruskan dengan tuntutan balasnya di bawah guaman S5 dan memfailkan bukti keberhutangannya, kerana ia pasti akan terpaksa memfailkan rayuan terhadap keputusan penyelesai-penyelesai sejurus selepas itu.

(4) Pembelaan dan tuntutan balas plaintif adalah termasuk satu tolakan (set-off) sekiranya defendan berjaya di dalam tindakannya. Oleh kerana tuntuan balas plaintif berkaitan kecacatan latent terhadap defendan jauh melebihi tuntutan defendan, dan oleh kerana defendan kini di bawah penggulungan sukarela pemiutang-pemiutang, maka adalah tidak mungkin jumlah yang dituntut balas terhadap defendan akan dapat diperolehi. Harus diperhatikan bahawa jika plaintif tidak meneruskan tuntutan balasnya di dalam guaman S5 dan sebaliknya mengemukakan bukti keberhutangan kepada penyelesai-penyelesai, tidak akan ada lagi ruang bagi plaintif untuk membuat tolakan terhadap tuntutan defendan terhadapnya.

(5) Oleh kerana tuntutan defendan dan tuntutan balas plaintif di dalam guaman S5 diasaskan kepada fakta yang sama, maka imbangan keselesaan adalah memihak kepada memberi kebenaran kepada plaintif untuk meneruskan. Ianya mengikut bahawa tuntutan balas plaintif tidak boleh ditangani secukupnya di dalam penggulungan oleh pemiutang-pemiutang defendan.

Case(s) referred to:
Mosbert Berhad (In Liquidation) v. Stella D'Cruz [1985] 2 MLJ 446 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 263(2)
Rules of the High Court 1980, O. 14, O. 81

For the plaintiff/appellant - Yusuf Khan Ghows Khan; M/s Yusuf Khan & Fong
For the defendant/respondent - Olivia CW Ho (Lim Sook Yee with him); M/s Paul Ong & Assoc

[Appeal from High Court, Kuala Lumpur; Originating Summons No: D5-24-185-2005]

Reported by Usha Thiagarajah

JUDGMENT

Zulkefli Makinudin JCA:

[1] This is an appeal by the plaintiff against the decision of the High Court at Kuala Lumpur in dismissing the plaintiff's application for an order that the plaintiff be given leave pursuant to s. 263(2) of the Companies Act 1965 ("the Act") to proceed with its counter-claim against the defendant in Kuala Lumpur High Court Civil Suit No. S5-22-77-2004 ("the S5 Suit").

Background Facts

[2] The relevant background facts of the case are as follows:

[3] The plaintiff is a development company engaged in the development project of a complex known as Galaxy Ampang, of which the defendant as the main contractor was responsible for the building construction thereof, having taken over the contract from the previous contractor.

[4] The matters relating to the works in question are contained in those documents known as the Letter of Intent dated 18 May 1996, the Supplementary Letter of Award dated 29 August 1997, a new Letter of Award dated 29 August 1997 and another Letter of Award dated 1 September 1999. The defendant's action in the S5 Suit was filed pursuant to the failure of the plaintiff and the defendant to effect the Final Settlement Agreement dated 13 March 2001. Under the said Final Settlement Agreement the

A plaintiff was to pay the defendant the amount of RM900,000 to be paid in cash and a specific performance of the units of properties in the complex to be transferred to the defendant or his nominees. Alternatively the defendant is seeking from the plaintiff a sum of RM1,585,668 representing the value of the said B units and RM156,443.30 representing the short-fall of the contra-value and rental for a tower crane amounting to RM365,000.

[5] Under a Settlement Agreement dated 22 December 1999, the parties resolved to settle the payment of the works completed C up till 22 December 1999 which was to be effected by monetary as well as contra-payment in the form of sale and purchase agreements in respect of contra-units in the complex. Subsequently a second Settlement Agreement was entered into on 13 March 2001 (the Final Settlement Agreement) which *inter alia* supercedes D the aforesaid Settlement Agreement dated 22 December 1999 particularly in the mode of payment.

[6] Consequent to the cessation of works by the defendant, as envisaged by the said Final Settlement Agreement, the plaintiff E appointed another new contractor to complete the remaining works left. Upon examining the works to be continued and completed the new contractor discovered serious latent defects which were so fundamental as to render it impossible to continue the works from where the defendant left them for the new F contractor to take over. The latent defects had to be rectified first and in certain instances to be redone, as they were wrongly carried out and completed contrary to specifications and basic requirements. The estimated costs of rectifying these latent defects is about RM17,898,000 and is now made the subject of the G plaintiffs counter-claim against the defendant's claims under the Final Settlement Agreement.

[7] After the defence and counter claim was filed by the plaintiff, the defendant was voluntarily wound up by their creditors on 28 April 2004. The defendant's defence to the plaintiff's counter-claim H is, *inter alia*, that the plaintiff's counter-claim is baseless, frivolous and vexatious as it was made merely to delay and avoid the plaintiff's liability to the defendant.

[8] Parties have filed their respective pleadings in the court and I the plaintiff's appeal against the summary judgment obtained by the defendant in the said S5 Suit pursuant to O. 14 of the Rules of High Court 1980 ("RHC 1980") was allowed by the court,

whilst the defendant's application for specific performance pursuant to O. 81 of the RHC 1980 was withdrawn by the defendant with no order as to costs. The matter is now fixed for case management.

Decision Of The Court On Appeal

[9] We heard this appeal on 17 May 2006 and we were unanimous in our decision allowing the appeal. We now give the reasons for our decision as follows:

[10] The plaintiff's application for leave to proceed with its counter-claim against the defendant in the S5 Suit is made pursuant to s. 263(2) of the Act which reads:

> After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

[11] On the guiding principle for the court to grant leave with a view to commencing action against a company that has been wound up, we would like to refer to the case of *Mosbert Berhad (In Liquidation) v. Stella D'Cruz* [1985] 2 MLJ 446 wherein Seah SCJ, in delivering the judgment of the Supreme Court at p. 447 had this to say:

> In *re Cuthbert Lead Smelting Co. Ltd.* [1886] WN 84 it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the Court will always give an application for leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings.

[12] It is clear, based on the above cited case authority, leave to proceed would only be granted when the plaintiff's claim cannot be adequately dealt with in winding up of the defendant's company or when the plaintiff is seeking a remedy which cannot be given in the winding up of the defendant's company.

[13] In dismissing the plaintiff's application, the learned judge in his judgment held *inter alia* as follows:

(a) Lodging a proof of debt constitutes a mandatory statutory process for a creditor of a wound up company like the plaintiff in this case.

A (b) The institution and continuance of the plaintiff's counter-claim or even the recovery of any judgment by the plaintiff will operate to confer a "sort of an unfair priority or advantage and undue preference" over the other creditors of the defendant's company including secured creditors.

B (c) The plaintiff is not restrained or impeded in any way from lodging a proof of debt with the liquidators of the defendant's company.

C (d) The allegation of bias or incompetency by the plaintiff against the liquidators of the defendant is baseless and unjustified.

(e) The plaintiff is not deprived of any legal right nor prejudiced in any way.

D (f) The counter-claim of the plaintiff is only at the stage of case management.

(g) To allow the plaintiff to proceed with their counter- claim would be time consuming and involves substantial costs being expended by the defendant.

E

(h) In the long run the trial of the plaintiff's counter-claim and the hearing of various other interlocutory applications filed or may be filed by the plaintiff against the defendant would render an unnecessary heavy financial strain on the defendant.

F

(i) The proof of debt process in the winding up of the defendant serves the very same purpose and is much cheaper and expeditious.

G (j) The plaintiff's counter-claim is drummed up to thwart and delay the defendant's original claim as well as to disrupt and delay the winding up process the defendant which would only result in the perpetration of injustice.

H (k) The plaintiff's application for leave is evidently a fruitless proceeding and a waste of time and costs.

(l) In accordance with the terms of the Settlement Agreement it is *prima facie* evidence that the plaintiff is not entitled to make any further claim including the counter-claim which is

I purportedly based on latent defects in relation to the works

which have been completed by the defendant and agreed to be fully settled by the plaintiff under the Settlement Agreement.

(m) The sole question to be determined is only a question of liability, ie whether the defendant is liable for the latent defects alleged by the plaintiff. Such question of liability hinges on the construction of the effect and intention of the Settlement Agreement.

(n) This question of defendant's liability has clearly been raised by the plaintiff *via* its defence filed against the defendant's original claim.

(o) The plaintiff's allegation that their counter-claim cannot proceed because the winding up court could not grant any relief in the form of a declaratory order cannot stand at all when the plaintiff's prayer for declaration can be adequately dealt within the original claim.

(p) The plaintiff's counter-claim is based on estimated costs. It is purely a speculative claim which most probably would not succeed.

[14] We are of the view it is apparent from the learned judge's findings that he misdirected himself on the facts and/or the law in dismissing the plaintiff's application for leave to proceed with their counter-claim in the action. It is our judgment that the plaintiff's counter-claim cannot be dealt with adequately in the winding up by the defendant's liquidators for the following reasons:

[15] Firstly, we noted that plaintiff's counter-claim in the said S5 Suit, is *inter alia* for a declaratory order that the Settlement Agreements are null and void as against the plaintiff. The Settlement Agreements do not only involve monetary payment but also payment by way of contra properties to the defendant and their nominees. It is therefore imperative for the plaintiff to obtain such a declaration as it will also determine the rights of contra purchasers whose rights emanate from the said Settlement Agreement. The liquidators, however, do not have the power to grant such a declaration.

[16] Secondly, the plaintiff's counter-claim is for rectification costs of RM17,898,000 and general damages to be assessed. In view of the extent and seriousness of the defects wherein there would be some degree of complexity of issues involved, it is unlikely that the defendant's liquidators can adequately deal with the plaintiff's counter-claim and quantify the damages suffered by the plaintiff in the winding up of the defendant.

[17] Thirdly, it is evident from paragraph 6.10 of the defendant's affidavit in reply to the plaintiff's present application that the liquidators have already pre-judged the matter and would definitely dismiss the plaintiff's proof of debt. This is what the liquidators have averred at paragraph 6.10 of their affidavit:

> The plaintiff's counter-claim is an afterthought, a baseless claim and has been filed with a view to delaying the implementation of the said Settlement Agreements. In addition the plaintiff has never objected as to the validity of the Settlement Agreements until the filing of the defendant's claim in the said S5 Civil Suit. (Translated)

[18] If the liquidators had already pre-judged the matter or the issues to be decided by them, it would be impractical and inconvenient for the plaintiff to discontinue with their counter-claim under the said S5 Suit and to file its proof of debt, only to file an appeal against the decision of the liquidators soon thereafter.

[19] Fourthly, the plaintiff's defence and counter claim also includes set-off in the event that the defendant succeeds in their claim. As the plaintiff's counter-claim for latent defects against the defendant is far in excess of the defendant's claim and the defendant is now under creditor's voluntary liquidation, it is unlikely that the amount counter-claimed against the defendant even after deducting the whole amount which the defendant claims in the said S5 Suit should the defendant succeed in their action, would be realized. It is to be noted also that if the plaintiff is to discontinue their counter-claim in the said S5 Suit and proceed to lodging a proof of debt with the liquidators, there would be no avenue for the plaintiff to set off the defendant's claims against the plaintiff.

[20] Finally, we are of the considered view as the defendant's claim and the plaintiff's counter-claim in the said S5 Suit are based on the same facts, the balance of convenience is in favour of leave to proceed being granted to the plaintiff.

Conclusion

[21] For the reasons above stated we would allow this appeal with costs here and in the court below and made an order in terms of the plaintiff's application dated 3 June 2005. All orders made by the High Court are set aside. The deposit paid is to be refunded to the plaintiff.